**Laborers' International Union of North America, Local Union No. 169 *and* Frehner Construction Co., Inc.** Case 32–CB–5976

February 6, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On November 16, 2006, Administrative Law Judge Burton Litvach issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The General Counsel and the Charging Party filed cross-exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's ruling, findings,[1] and conclusions and to adopt the recommended Order[2] as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Laborers' International Union of North America, Local Union No. 169, Reno, Nevada, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to meet and bargain with Frehner Construction Co., Inc., as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time laborers employed by the Employer in the State of Nevada, except Clark County, Lincoln County, the town of Tonopah, and the portions of Nye County and Esmeralda County lying south of Highway Six (U.S. 6); excluding all managers, salespersons, estimators, office clerical employees, all other employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain with Frehner Construction Co., Inc., with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its union office and hiring hall facility in Reno, Nevada, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepts, among other things, to the judge's failure to specifically find that Fred Courrier is no longer employed as the Employer's project manager. The record does, in fact, show that Courrier was no longer employed at the time of the hearing. This finding, however, does not affect our decision herein.

We adopt the judge's finding that the Respondent violated Sec. 8(b)(3) of the Act by refusing to meet and bargain with the Employer. In particular, we agree with the judge that, under *James Luterbach Construction Co*., 315 NLRB 976 (1994), in the context of an 8(f) relationship, the Employer timely withdrew its proxy and effectively demonstrated its intent not to recommit to the upcoming multiemployer bargaining. While there were three separate opinions in *Luterbach*, a common rationale of the Board majority (Members Stephens and Cohen and Chairman Gould) was that there must be affirmative conduct that recommits an employer to multiemployer bargaining. Here that did not occur. By insisting the Employer was bound to the successor agreement and refusing to bargain with the Employer for a new agreement upon its certification as the 9(a) representative of the Employer's employees, the Respondent violated Sec. 8(b)(3).

In finding the violation, the judge rejected the General Counsel's argument that a violation should be found under the rationale set forth in *Plasterers Local 337 (Marina Concrete)*, 312 NLRB 1103 (1993). In that case, which issued before *James Luterbach,* the Board held that an employer's withdrawal of authorization prior to the effective date of the successor contract, but after the commencement of informal discussions, was timely. Because the application of *Marina Concrete* would not require a different result here, we find it unnecessary to pass on the judge's discussion of that case.

[2] We shall modify the judge's recommended Order to include the Board's standard remedial language for the violation found, and we shall substitute a new notice to conform to the language set forth in the Order.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Frehner Construction Co., Inc., if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible agent or representative on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 6, 2008

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO MEMBERS
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to meet and bargain with Frehner Construction Co., Inc., as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time laborers employed by the Employer in the State of Nevada, except Clark County, Lincoln County, the town of Tonopah, and the portions of Nye County and Esmeralda County lying south of Highway Six (U.S. 6); excluding all managers, salespersons, estimators, office clerical employees, all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, meet and bargain with Frehner Construction Co., Inc., with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 169

*D. Criss Parker, Esq.,* for the General Counsel.
*Michael E. Langton, Esq. (Law Offices of Michael E. Langton),* of Reno, Nevada, for the Respondent.
*James T. Winkler, Esq. (Littler Mendelson),* of Las Vegas, Nevada, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in the above-captioned matter was filed by Frehner Construction Co., Inc. (Frehner), on August 8, 2005, and, after an investigation and consideration of the legal issues, on March 29, 2006, the Regional Director for Region 32 of the National Labor Relations Board (the Board), issued a complaint, alleging that Laborers' International Union of North America, Local Union No. 169 (the Respondent), engaged in, and continues to engage in, acts and conduct violative of Section 8(b)(3) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of the alleged unfair labor practices and raising certain affirmative defenses. Pursuant to a notice of hearing, a trial before the above-named administrative law judge was held on May 17 and 18, 2006 in Reno, Nevada. During said trial, all parties were afforded the right to call witnesses on their behalf, to cross-examine witnesses called by other parties, to offer into evidence all relevant documentary evidence, to argue their legal positions orally, and to file posthearing briefs. The documents were filed by counsel for the General Counsel, counsel for Frehner, and counsel for Respondent, and each brief has been carefully examined. Accordingly, based upon the entire record herein, including the posthearing briefs and my observations of the testimonial demeanor of the several witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

At all times material herein, Frehner, a State of Nevada corporation with an office and place of business in North Las Vegas, Nevada, has been engaged in the building and construction industry in the construction of roads and buildings for government agencies and other entities. During the 12-month period immediately preceding the issuance of the instant complaint,

which period is representative of its business activities described above, Frehner, in the course and conduct of its business operations, purchased and received goods and services valued in excess of $50,000 directly from suppliers located outside the State of Nevada. Frehner is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ISSUES

The instant complaint alleges that Respondent engaged in acts and conduct violative of Section 8(b)(3) of the Act by, since on or about July 22, 2005, failing and refusing to meet with Frehner with respect to negotiating a collective-bargaining agreement covering certain of its employees on behalf of whom Respondent is the bargaining representative. Respondent denies that it was obligated to meet and bargain with Frehner inasmuch as Frehner was, and is, lawfully bound to a collective-bargaining agreement with it through and including July 15, 2010, covering the same bargaining unit employees. In this regard, Respondent argues that Frehner belatedly withdrew its authorization for a multiemployer bargaining association to bargain for said agreement on its behalf and that, in any event, by its actions, Frehner has adopted said agreement. Contrary to Respondent, while not denying the existence of the latter agreement, the General Counsel argues that Frehner is not a party to said agreement as it did, in fact, withdraw its authority for a multiemployer association to bargain on its behalf prior to the commencement of actual negotiations for the agreement and that Frehner has never adopted the above contract.

## IV. THE ALLEGED UNFAIR LABOR PRACTICES

### *A. The Facts*

The record establishes that Frehner is a State of Nevada corporation with offices in North Las Vegas, Elko, and Sparks, Nevada and Park City, Utah; that it acts as a general contractor in the building and construction industry primarily engaged in performing "heavy" highway and bridge construction work including all grading, paving, foundation, and bridge work; that, in performing the above-described work, Frehner employs its own work force but subcontracts out so-called specialty tasks including fencing, traffic control, sign installation, and electrical work; and that, for its construction projects in northern Nevada, it utilizes a work force of approximately 100 employees, including workers classified as laborers, during peak periods. Michael Pack is the president of Frehner, and Sean Stewart has been its general counsel since 2004. They maintain offices at Frehner's corporate office in North Las Vegas; area managers, Fred Courrier and Gary Isaman, project managers, and superintendents are based at its northern Nevada office in Sparks. The record further discloses that Frehner has been a longstanding employer-member of the Nevada Chapter of the Associated General Contractors of America, Inc. (AGC), which is a multiemployer association comprised of employers, who are engaged in the building and construction industry and which negotiates collective-bargaining agreements, on their behalf, with unions, including Respondent, which represent their employees employed in the various construction crafts. Through its membership in AGC, Frehner has had, at least, a 20-year bargaining relationship with Respondent and has been bound to successive collective-bargaining agreements, covering its full-time and regular part-time laborer employees, between AGC and Respondent, including an agreement effective from July 16, 2000, through July 15, 2005.[1] At all times material herein, John D. Madole has been the executive director of AGC, and Richard Daly has been the business manager/secretary treasurer of Respondent.

In May 1995, just prior to the commencement of AGC's negotiations for an agreement, which ultimately became effective from 1995 through July 15, 2000, with Respondent, Garth Frehner, on behalf of Frehner, entered into a proxy agreement with AGC, which, by its terms, appointed the latter to act as Frehner's "lawful proxy, to represent me and negotiate a labor agreement on my behalf, and if such agreement is satisfactory to my proxy to sign such labor agreement. . . ." At or prior to the expiration of this agreement, AGC and Respondent engaged in bargaining for their agreement, which became effective from 2000 through 2005. On behalf of Frehner, Michael Pack was a member of the AGC's bargaining committee and participated in the contract negotiations, and there is no dispute that, pursuant to the above-described proxy, Frehner became bound to, and adhered to, the terms and conditions of employment set forth in the latter agreement. Thus, according to General Counsel Stewart, Frehner complied with the agreement as "we felt we were bound to it, we were bound to this agreement . . ." and as ". . . it was my understanding we had a proxy with the AGC at the time. . . ."[2]

While Frehner had no difficulty with adhering to any of the provisions of the existing agreement for the initial 2 years of the contract period, the situation suddenly changed in 2003. Stewart testified that, on Respondent's projects in Northern Nevada, it normally subcontracted the traffic control, striping, signage, permanent signage, and barrier rail work to United Rentals, which also was party to a collective-bargaining agreement with Respondent covering its laborer employees, but that, over time, United Rentals had been submitting bids for less of the above-described work. Then, in 2003, in the midst of work on a freeway interchange project, known as the "spaghetti bowl," for Frehner in Reno, United Rentals abruptly ceased work entirely,[3] and ". . . [Frehner] had to scramble in the middle of that [project] to replace United. . . ." The problem for

[1] AGC's agreement with Respondent covered the work of Frehner's laborers on its projects within the State of Nevada except those located in Clark and Lincoln counties, the town of Tonopah, and that portion of Nye and Esmeralda counties lying south of Highway 6.

[2] Michael Pack also conceded the validity of the proxy as of July 26, 2004.

[3] According to Sean Stewart, United Rentals was ". . . having issues with the Laborers' Union and they no longer could be competitive in the area." He added that United Rentals continues to do business in southern Nevada and Frehner continues to do business with "certain divisions" of the company.

Frehner was that section 2 of the Laborers' collective-bargaining agreement required a general contractor to be responsible ". . . for all actions of a subcontractor, including payment of wages and fringes, jurisdiction assignments and the observation of this agreement." In northern Nevada, there existed no union signatory subcontractors, which performed all the work performed by United Rentals, and, upon ceasing operations in the area, the latter sold many of its assets to a nonunion contractor, Nevada Barricade, which then became the only subcontractor bidding for certain types of the work, which previously had been performed by United Rentals. In these circumstances, as its employer-members, including Frehner, sought relief from what they perceived as an overly restrictive subcontracting clause, AGC representatives engaged in discussions with Richard Daly regarding ". . . what to do in a situation where the union signatory subcontractors were not available" and, according to Stewart, while "there were concessions made by both [parties] on certain areas of work . . . traffic control with the union was one area where they refused to give us any [relief] in relation to Nevada Barricade."[4] Stewart further testified that, while Respondent had informed Frehner that it recognized the difficulties the former experienced in locating union-signatory subcontractors and expressed a willingness to work with the Charging Party, the latter did not believe Respondent's sincerity as Daly had always expressed "dissatisfaction" with Nevada Barricades and "would turn the other eye" when other nonunion subcontractors were mentioned. What particularly angered Pack was that Respondent's prior interpretation of the subcontracting provision had been to require general contractors to use signatory contractors first as subcontractors but, if none were available, to permit the general contractors to use nonsignatory contractors. However, according to Pack, Daly had changed Respondent's policy so as to require the use of only union signatory subcontractors, ". . . and . . . that's when we had our differences."

While Pack engaged in ultimately fruitless individual discussions with Daly, seeking complete relief from the strict language of the aforementioned contractual subcontracting provision, in early 2004, AGC's labor policy committee held meetings in order to discuss whether to approach Respondent, concerning early informal discussions[5] for extending their existing collective-bargaining agreement and avoiding a possible strike or lockout situation, and decided to do so.[6] Thereafter, in the spring of that year, John Madole contacted Respondent regarding engaging in such informal contract discussions. Richard Daly readily agreed to AGC's request, and, on June 1, 2004, Daly and Madole signed a document, entitled memorandum of understanding, in which they stated their agreement that

> [t]he parties will engage in informal discussions with respect to the possibility of amending, modifying, or renewing the Collective Bargaining Agreement prior to the formal expiration of the Collective Bargaining Agreement. If the parties, through their informal discussions, arrive at a mutual agreement and understanding as to the terms and conditions of any such proposed amendment, modification, or renewal, at that time, the parties will formally open the . . . Agreement to make such amendments, modifications, and/or renewals consistent with the mutual understanding that is derived from the informal discussions.

Further, AGC and Respondent agreed that the memorandum of understanding did not constitute formal notice, by either party, to terminate or open the existing agreement for negotiations and that, if the "informal discussions" failed, the formal termination and opening language of the existing collective-bargaining agreement would remain in effect. As to why the parties termed what they were about to enter into as "informal discussions," Madole testified that ". . . unless both parties reached complete agreement on mutual desires . . . we would walk away and finish the agreement in 2005" and that they could avoid the legal issues, attendant to collective bargaining, including impasse, strikes, and lockouts.[7] Based upon the memorandum of understanding, on June 22, July 8, 11, and 21, 2004, AGC and Respondent engaged in their "informal discussions" for a successor collective-bargaining agreement, and, according to Madole and Daly, the parties concluded their informal discussions on the latter date with all participants shaking hands on an apparent deal. According to Mark Sullivan and Madole, during their four meetings, the parties discussed all "the typical ele-

[4] R. Exh. 1 is a memorandum of understanding between AGC and Respondent, dated July 31, 2003, with regard to solving the problem caused by an insufficient number of qualified signatory bidders to perform pavement marking and highway striping work. The memorandum of understanding established the circumstances and limits whereby the subcontracting provision of the 2000 through 2005 agreement would be waived. Apparently, Respondent agreed to waive compliance with the subcontracting provision for all work of subcontractors prior to July 31, 2003, but specifically excluded four Frehner projects. With regard to Frehner's four projects, it received relief from the subcontracting provision for the pavement marking and highway striping work of subcontractors performed on or after July 1, 2004. Excluded was traffic control, permanent signage, and guardrail work.

[5] According to John Madole, notwithstanding that the existing contract's termination language was explicit the agreement would remain in effect until July 15, 2005 ". . . unless either party to the agreement shall give written notice to the other of a desire to change, modify, or terminate the Agreement not more than 90 days nor less than 60 days prior to July 15, 2005 . . .," in the past, the parties had utilized a procedure for obviating such a formal reopening of their contract by engaging in what were termed "informal discussions."

[6] According to Mark Sullivan, AGC's assistant executive director during 2004, Frehner was aware of these meetings as ". . . we call everybody on our list. Anybody that we have a proxy for . . . as a courtesy . . . . I know what I would typically do is I would just contact the local office here, and I believe the person . . . would either be Bob Perretto or Fred Courrier. . . ." Further, Sullivan thought that Courrier attended at least one of the labor policy committee meetings.

[7] Likewise, Mark Sullivan believed the parties labeled their talks informal discussions as ". . . we wanted to make sure . . . it was for protection from both sides. . . . We wanted to just have the opportunity to sit down and have nobody beholden to anything. . . ." Sullivan did not believe legal protection was primary in the parties' mindset for the discussions. "I think it was more what was going on the marketplace, we were trying to head off . . . a problem that we may have down the road for both the labor side and [the] management side. . . ." On the other hand, according to Richard Daly, "I think both sides were worried about either a strike or a lockout. Neither side wanted to wait until 2005."

ments of a collective-bargaining agreement," including wages and other terms and conditions of employment; sign-in sheets were distributed; there were proposals made on various issues by both parties; positions were modified after back and forth discussion; and agreements were reached.[8] According to Daly, no participant believed anything less than bargaining had occurred.

Respondent was charged with mailing a copy of the June 1 memorandum of understanding to each AGC signatory contractor, and Michele King, the office manager for Respondent, testified that she mailed copies of the memorandum of understanding, each attached to a cover letter, dated June 14 and signed by Daly, to Frehner's North Las Vegas and Sparks offices.[9] While Sean Stewart denied having seen the memorandum of understanding and the cover letter prior to early 2005,[10] it is clear that Frehner was well aware of the occurrence of the above-described informal discussions. Thus, according to Michael Pack, he first heard about them from one of Frehner's northern Nevada area managers,[11] either Fred Courrier or Gary Isaman, and the area manager told him that ". . . I've got a letter here from AGC about informal discussions with the Laborers. And I just said . . . that's not for us to go to."[12] Mark Sullivan corroborated Pack on this point, testifying that, after attending one of the labor policy committee meetings, Courrier ". . . had some communication with . . . Mike Pack, and Mike told him not to attend any meetings and that was the end." Notwithstanding Respondent's mailings, Pack maintained that he was never notified by AGC with regard to the informal discussions between itself and Respondent and testified that no one from Frehner participated in the said informal discussions, and, in any event, ". . . they're just informal discussions, they really don't mean anything when it came time to have a formal discussion. . . ." Sullivan corroborated Pack, stating he did not contact Frehner with regard to the informal discussions with Respondent as, based upon what Courrier told him, he did not believe it "necessary" to do so.

The record reveals that the apparent agreement, which was reached by Respondent and AGC, at the conclusion of their July 21 meeting was, pending ratification by Respondent's employee-members,[13] to extend their existing collective-bargaining agreement through 2010, with certain agreed-upon changes and to execute another memorandum of understanding, which would constitute the formal opening of their existing collective-bargaining agreement to enable them to incorporate the agreed-upon changes reached through their informal discussions. The only corroboration for AGC's and Respondent's assertion that complete agreement was reached is found in Madole's notes for this meeting on which he wrote and circled "settled/9:45 a.m." at the bottom. In fact, however, complete agreement was not attained on July 21. Thus, the parties did not agree upon an effective date for the contract extension, and, according to Daly, their only agreement on this point was ". . . to have it effective as soon as we could physically get all of the agreed-upon changes in writing." Moreover, several drafts of the proposed memorandum of understanding, most of which are dated between July 27 and 30, circulated between the parties, and examination of the drafts, General Counsel's Exhibits 25 through 28, patently reveals the absence of agreement on the contract extension effective date until the latter date. In this regard, Exhibit 25 bears two effective dates—October 1, 2004 for fringe benefits and August 1 for all other provisions; Exhibits 26 and 28 state as the effective date October 1, 2004; and the first page of Exhibit 27 contains a crossed-out sentence establishing July 30, 2004 as the effective date and the second page of the document has October 1 crossed out and July 30 interlined above it.

Michael Pack testified that he did not become aware that the informal discussions between AGC and Respondent had resulted in an agreement until July 26 or 27. According to Frehner's president, on one of the above dates, he received a telephone call from Madole, who told Pack that he was aware Frehner was unhappy with the subcontracting provision of the existing collective-bargaining agreement, "and that's the reason that he knew to give me a call." Madole said that AGC's discussions with the Laborers had been "informal," but "have gone on in an informal tone to more of a formal tone . . . and it looks like we'll enter into some type of formal negotiations with the Laborers. . . ." Madole continued, telling Pack that the existing subcontracting clause language would not be changed, and the latter replied ". . . unless we've got it in writing with regards to how to move forward with non-signatory subcontractors, then we could not sign that agreement." To this, Madole responded that, if Frehner did not want to be party to the new collective-bargaining agreement, Pack had to withdraw its existing proxy.[14] During cross-examination, asked if Madole told him that the parties had reached a tentative understanding with regard to a new agreement, Pack replied, ". . . not to a new contract. It was an understanding of going ahead with a formal discussion towards a new contract." He then added, "I believed that the parties were very close to reaching agreement under a

[8] Madole testified that, during the informal discussions, Respondent never offered proof of majority support among the employees of any signatory contractor, including Frehner.

[9] R. Exh. 2 is the address label sheet, utilized by Respondent for mailing the memorandum of understanding and attached cover letter to signatory contractors, including Frehner. The document shows the two office addresses for the latter.

[10] According to Stewart, when mail not addressed to any particular individual arrives at Frehner's North Las Vegas office, it ". . . is opened by the receptionist in front and the documents are given to the people responsible for those duties. Any correspondence . . . from unions . . . were given to either Mike Pack or myself." Stewart added that Pack never told him he had seen the memorandum of understanding prior to 2005, and if he had seen it, "he would have discussed it with me. . . ."

[11] Pack asserted that he had never seen the June 1, 2004 memorandum of understanding or Respondent's cover letter until the first day of the trial.

[12] According to Pack, other than the subcontracting provision, he was satisfied with the terms of the existing collective-bargaining agreement, and ". . . there was no use in us going to informal discussions and talking about other points."

[13] According to Madole, Daly assured him that their agreement would be ratified, and Daly testified that he is authorized to consummate agreements without ratification.

[14] According to Pack, Madole never said he thought Frehner was bound to the 2010 contract extension.

formal basis." On this latter point, Pack was impeached by his pretrial affidavit wherein he stated that, during their telephone conversation, Madole said ". . . that the AGC had reached a tentative understanding with the union for a new collective-bargaining agreement." With regard to their telephone conversation, which he recalled occurred on July 26, Madole testified that Pack placed the telephone call to him and ". . . expressed to me that he had just learned that we had reached some sort of an agreement on an extension of the [existing contract] and that he did not wish to be bound. . . . I told him I wasn't exactly sure what his position was but that he asked me what he might do and I said, withdraw your proxy and perhaps that will get you out of being extended on the agreement."[15] Pursuant to Madole's advice, on July 27, on behalf of Frehner, Pack sent the following letter to AGC's office:

> Re: Withdraw of Proxy Laborers' International Union
>
> Gentlemen:
>
> You are hereby notified that Frehner Construction Company, Inc. herewith revokes any or all proxies heretofore given you with respect to negotiations on a new bargaining agreement with the Laborers' International Union of North America, Local 169.
>
> You are not authorized nor empowered to act as proxy holder or agent on our behalf in any negotiation, nor to execute any bargaining agreement on our behalf, with any of the foregoing named Union.
>
> The withdrawing of our proxy is for future agreements only, not the agreement to which we are currently bound to with the Laborers' International Union of North America Local 169, which is currently in place until July 15, 2005.

Also, on the same day, Pack telephoned Daly at Respondent's office and informed him of the contents of the above letter to AGC. Pack testified that he and Daly discussed the fact that the only issue between Respondent and Frehner was the subcontracting clause, and "he had his position; we had our position . . . . I said I'm writing a letter to withdraw my proxy from the AGC, and I'm going to look forward to future negotiations for a new contract when this contract expires. . . . [H]e expressed his opinion once again . . . that if he can get the signatory general contractors to force all the subcontractors to become signatory, then that would solve the problem."[16]

Notwithstanding Daly's testimony that such was unnecessary, Respondent's employee-members ratified the extension of the collective-bargaining agreement on July 29, and, the next day, Respondent sent a letter to all signatory contractors, including Frehner, in which Daly stated:

> On June 14, 2004 you were sent a notice that [Respondent and AGC] were going to engage in informal discussions with respect to the possibility of amending, modifying or renewing the collective-bargaining agreement prior to the formal expiration date. . . . All contractors were invited to attend or to contact the AGC concerning such discussions.
>
> On July 20, 2004 the Union and the AGC as a result of the informal discussions arrived at a mutual agreement and understanding pending ratification by the members of Laborers' 169 as to the terms and conditions of the proposed amendments, modifications and extensions and/or renewals of the [contract], accordingly the Union and the AGC agreed to formally open the [existing contract] to make the [agreed-upon changes]. . . .
>
> On July 30, 2004 [Respondent and AGC] formally opened the Laborers' Master Agreement and agreed . . . to amend, modify, extend and/or renew the [existing collective-bargaining agreement].

As stated in the above letter, that same day, Daly and Madole entered into a memorandum of understanding, dated July 30, 2004. Said document states, in part:

> WHEREAS, as a result of the informal discussions, the Union and the AGC have arrived at a mutual agreement and understanding as to the terms and conditions of the amendments, modifications, extension, and/or renewal of the existing laborers' Master Agreement;
>
> Therefore, the Union and the AGC agree as follows:
>
> The Union and the AGC will formally open the existing . . . Agreement for the sole and exclusive purpose of extending a successor . . . Agreement that incorporates the amendments, modifications, extension and/or renewal that have been agreed to during the informal discussions.
>
> The Successor Master Labor Agreement shall be effective July 30, 2004. The agreed to amendments, modifications, extension and/or renewal derived from the informal discussions shall be incorporated by reference . . . and shall remain in full force and effect to and including July 15, 2010. . . .

There is no dispute that, pursuant to Pack's statement in his July 27 letter, Frehner continued to adhere to the terms and conditions of employment set forth in the 2000 through 2005 collective-bargaining agreement between Respondent and AGC. Then, in approximately February or March 2005, Daly and Respondent's counsel met with Pack and Sean Stewart in Frehner's North Las Vegas office. Prior to the meeting, Stewart sent a subcontracting proposal to Respondent, but the latter failed to respond. According to Stewart, during the meeting, Daly gave Stewart a copy of the June 14, 2004 memorandum of understanding between AGC and Respondent, and ". . . the substance of our conversation . . . was, how we address the subcontracting language contained in the 2005 agreement, so as to make it compatible with our work schedule and our ideas

[15] According to Madole, he offered no assurance to Pack that withdrawing Frehner's proxy would enable it not to be bound to the 2010 extension of the AGC contract with Respondent. Madole averred that he has been cautioned by AGC's attorney not to offer legal advice. Further, asked by me if, prior to their telephone conversation, he had any indication whether Frehner wanted, or did not want, to be bound to the Laborers' contract extension, Madole replied, "I was unaware of anything either way."

[16] Corroborating Pack's testimony that he orally informed Daly of Frehner's withdrawal of the proxy is Daly's request to Madole that the latter send to Respondent a copy of Pack's July 27 letter. Madole did so on August 13, 2004.

going forward." Thereafter, on March 24, 2005, Respondent sent to Frehner a recognition demand letter, stating that it ". . . represents a majority of the laborers in the Laborers' Bargaining Union [sic] employed by the Company in the territorial jurisdiction of the Union. . . ." and demanding recognition as the ". . . exclusive representative under Section 9(a) of [the Act]." Frehner did not reply, and, on May 4, Respondent filed a petition in Case 32–RC–5348 with Region 32 of the Board, seeking certification as the Section 9(a) bargaining representative of Respondent's laborer employees within its territorial jurisdiction. On May 16, Frehner's attorney wrote to Region 32 that Frehner would be willing to proceed to an election in a "stipulated" single-employer bargaining unit. Meanwhile, on May 9, Stewart sent a letter to Respondent, giving notice, pursuant to the termination provision of the 2000 through 2005 collective-bargaining agreement between AGC and Respondent, of Frehner's intent to terminate the agreement. In his letter, Stewart noted that Frehner had previously withdrawn authority from any other entity, including AGC, to bargain on its behalf. Daly replied by letter, dated May 18, stating that Respondent's notice was not timely inasmuch as AGC and Respondent previously had extended their agreement through 2010 at a time when AGC continued to hold Frehner's valid proxy to bind the latter to said extension. Thereafter, in June 2005, an NLRB-conducted election was held in which Respondent received a majority of the valid votes cast. Frehner did not contest the result of the election, and, on July 18, 2005, the Regional Director of Region 32 of the Board certified Respondent as the exclusive bargaining representative of the laborer employees of Frehner within the territorial jurisdiction of Respondent.

Six days prior to the Board's certification, Stewart, on behalf of Frehner, sent a letter to Respondent, accepting the result of the Board's election and extending recognition to Respondent as the 9(a) representative of its laborer employees within Respondent's territorial jurisdiction.[17] Also, Stewart wrote that "Frehner requests that negotiations commence between Frehner and Laborers for a new collective-bargaining agreement . . . under which both sides may continue to operate" and that Frehner would continue to abide by the terms and conditions of the 2000 through 2005 collective-bargaining agreement until agreement on a successor was reached by the parties or until bargaining resulted in an impasse. Ten days later, on July 22, Daly wrote a letter to Stewart and, essentially, refused to engage in bargaining with Frehner, stating that Respondent believed Frehner was, and remained, bound to the recently completed 2005 through 2010 contract extension agreement between AGC and Respondent, that, pursuant to *Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982), and *Retail Associates*, 120 NLRB 388 (1958), Frehner's withdrawal of its proxy was untimely, and that Respondent would be prepared to bargain with Frehner "only at the appropriate time." On July 29, Stewart replied to Daly by letter, stating Frehner's disagreement with the legal conclusions set forth in his July 22 letter and reiterating Frehner's request to commence bargaining on a successor collective-bargaining agreement, and, on August 4, Daly, by letter, replied to Stewart, stating that Respondent was ". . . firm in our position that your request is not timely. . . ."

Sean Stewart testified that, notwithstanding AGC's and Respondent's extension of their 2000 through 2005 collective-bargaining agreement until 2010, Frehner ". . . [has] tried to follow the [2000 through 2005] agreement in all that we do. . . . To my knowledge we were careful to implement the old . . . contract and not use any of the new information," including the new wage rates. The record establishes that section 26 of the collective-bargaining agreement between Respondent and AGC requires a signatory contractor to pay, on behalf of each laborer employee, a "working assessment" payment,[18] commonly referred to as the dues checkoff, to Respondent[19] for the operation of its hiring hall and the building trades assessment fund and that, from October 2004 through October 2005, Frehner paid the dues checkoff assessment at the rate of 44 cents per hour for each laborer employee. According to Richard Daly, the foregoing contractual dues checkoff payment amount went into effect on October 1, 2004; it represented a 1-cent-per-hour increase over the previous checkoff amount; and the increase was based upon a wage increase, which went into effect on October 1 for laborers as a result of the agreement reached by the AGC and Respondent on July 30, 2004.[20] Daly added that, between October 2004 and October 2005, no one from Frehner ever contacted him, contending that the increase in the checkoff was a mistake, and that Frehner would no longer pay the increased amount.[21] Contrary to Daly, Sean Stewart testified that an individual in Frehner's payroll department informed him that, in October 2004, pursuant to the contractual formula, the dues checkoff amount would have increased from 43 cents to 44 cents notwithstanding the October 1 wage increase established by the 2010 contract extension agreement.[22] Moreover,

[17] According to Stewart, he sent the latter as "we had recently received the results of the election, it was my understanding that we were now a single employer unit with a 9(a) relationship, and we were coming close to [the deadline for terminating the existing 2000 through 2005 collective-bargaining agreement], and I wanted to let the Union know that . . . we wanted to bargain for a new agreement and . . . we would continue under the old agreement."

[18] Frehner deducted an amount, calculated at 2.25 percent of the hourly wage rate, from each laborer's gross wages.

[19] The total dues checkoff amount for all of a contractor's laborers is paid to a trust funds administrator on a monthly basis, and the trust funds administrator transmits the payment to Respondent.

[20] In October 30, 2004, Respondent sent a letter to each signatory contractor, including Frehner, advising each as to the increase in the dues checkoff amount.

[21] While Respondent argues herein that, by it's conduct, Frehner has adopted the 2005 through 2010 contract extension, it failed to raise this as an affirmative defense and never asserted this defense orally or in writing to Frehner prior to the hearing.

[22] In this regard, in R. Exh. 8, a letter from Daly to signatory contractors dated October 30, 2002, he wrote that the dues checkoff assessment is based upon a percentage of a laborer employee's wage rate; that, if employees' wage rates increase, the check off assessment would likewise increase, and that Respondent would notify contractors of any increase in the dues checkoff assessment 60 days prior to the effective date of the change. Analysis of the 2000 through 2005 collective-bargaining agreement discloses that laborer employees received a 50-cents-wage/fringe benefit package increase on October 1, 2004, with Respondent required to give notice to the contractors 60 days prior to

Frehner refused to pay an additional checkoff increase in October 2005 on grounds that a new contract between Frehner and Respondent had not been executed.[23]

### *B. Legal Analysis*

The complaint alleges that, commencing on July 22, 2005, Respondent engaged in, and continues to engage in, acts and conduct violative of Section 8(b)(3) of the Act by failing and refusing to meet and bargain with Frehner concerning a collective-bargaining agreement between the parties. In this regard, Section 8(d) of the Act defines bargaining collectively as ". . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement. . . ." In these regards, it is, of course, axiomatic that an employer violates Section 8(a)(1) and (5) of the Act by failing and refusing to meet with reasonable promptness and frequency with the bargaining representative of its employees in order to engage in collective bargaining. *People Care, Inc.*, 327 NLRB 814, 825 (1999). Moreover, since Section 8(b)(3) of the Act parallels Section 8(a)(5), it is clear that the obligations, imposed upon employers, to meet at reasonable times and places in order to bargain are likewise applicable to labor organizations. *AAA Motor Lines, Inc.*, 215 NLRB 789, 791 (1974). Herein,[24] Respondent was certified as the bargaining representative for Frehner's full-time and regular part-time laborer employees within the former's geographic jurisdictional area, a single employer unit; on July 12 and 29, 2005, Frehner requested that Respondent commence negotiations with it for a collective-bargaining agreement; and it is not in dispute, that, by letters dated July 22 and August 4, 2005, Respondent stated its refusal to meet and commence bargaining with Frehner until the appropriate time. In these circumstances, it is apparent that the General Counsel has established a prima facie violation of Section 8(b)(3) of the Act and that the real issues in the instant matter are the validity of Respondent's defenses—that Frehner is bound to the 2010 extension agreement between Respondent and AGC and, therefore, Respondent is under no obligation to bargain on an individual basis with Frehner until the expiration of said agreement and that, by its conduct, Frehner adopted the said extension agreement.

With regard to Respondent's initial defense, it asserts that Frehner's July 27, 2004 withdrawal of its proxy to AGC did not constitute a timely withdrawal from multiemployer bargaining so as to enable it to refrain from abiding by the 2010 contract extension agreement between AGC and Respondent, and, in support, Richard Daly, in his July 22 letter to Frehner, and counsel for Respondent, in his posthearing brief, relied upon the Supreme Court's decision in *Charles Bonanno Linen Service v. NLRB*, supra, and the Board's decision in *Retail Associates*, supra. In *Retail Associates*, the Board held that an employer's ". . . decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual employer basis," and that it would not permit withdrawal ". . . except upon adequate written notice given prior to the date set by the contract for modification or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." Id. at 394–395. In *Charles Bonanno Linen Service v. NLRB*, the Supreme Court upheld the *Retail Associates* guidelines for proper withdrawal from multiemployer bargaining, stating "these rules, which reflect an increasing emphasis on the stability of multiemployer bargaining units, permit any party to withdraw prior to date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations . . . have commenced, however, withdrawal is permitted only if there is 'mutual consent' or 'unusual circumstances' exist." Pursuant to this legal structure, counsel for Respondent asserts that negotiations between AGC and Respondent for a successor collective-bargaining agreement had commenced in June and continued through July 2004; that it was not until July 27, after negotiations had been completed, that Frehner notified AGC that it was revoking its proxy concerning negotiations for a new collective-bargaining agreement with Respondent; that Frehner withdrew its proxy for future agreements and not for the recently completed contract extension; and that Respondent did not receive written notice of Frehner's withdrawal from multiemployer bargaining until mid-August.

While Respondent correctly stated the rules for valid withdrawal from multiemployer bargaining in the context of a Section 9 bargaining relationship, the *Retail Associate* rules no longer govern withdrawal from multiemployer bargaining in the context of an 8(f) bargaining relationship. Thus, there is no dispute that, at least with regard to the 2000 through 2005 collective-bargaining agreement and, undoubtedly for the prior agreements between the parties, the employer members of AGC, including Frehner, each recognized Respondent as the bargaining representative for its laborer employees pursuant to Section 8(f) of the Act, which, of course, permits employers in the building and construction industry to recognize and bargain with labor organizations, acting as the bargaining representative for certain of their employees, notwithstanding that the labor organization has not established majority status. In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board required that "when parties enter into an 8(f) agreement, they . . . comply with that agreement unless the employees vote, in a Board-conducted election to reject (decertify) or change their bargaining representative." Likewise, in an 8(f) context, an employer,

---

the effective date of the portion of the increase to be allocated to wages and the portion to be allocated to fringe benefits. As counsel for Frehner points out, even if only a small percentage of the 50 cents would have been allocated to wages, such would have triggered a corresponding 1-cent increase in the dues checkoff amount.

[23] Daly conceded that Frehner has always maintained that it is not bound to the 2010 contract extension.

[24] I have considered the credibility of the several witnesses, and each impressed me as being truthful, a refreshing conclusion in an era during which dissembling appears to be a distressing fact in hearings before the Board. More particularly, I note that the witnesses were basically corroborative on the pertinent facts and that the few areas of disagreement are not significant.

which signs an agreement to be bound by multiemployer association bargaining or to adhere to an association agreement, must abide by that agreement for its term. *Twin City Garage Door Co.*, 297 NLRB 119 (1989). However, with regard to the binding effect upon an 8(f) employer of a successor to such a multiemployer agreement, in *James Luterbach Construction Co.*, 315 NLRB 976 (1994), the Board noted that the *Retail Associates* rule was developed within the context of multiemployer bargaining relationships, governed by Section 9 of the Act, in which, upon expiration of an agreement, the signatory employers have a statutory obligation to bargain for a successor contract and concluded that, in contrast, as an employer, which has an 8(f) relationship with a labor organization, does not have an obligation to bargain for a successor agreement; "if a multiemployer group consists solely of such employers, neither the multiemployer group nor any of its members would have an obligation to bargain for a successor contract." *James Luterbach Construction Co.*, supra at 979. Continuing, the Board noted that an employer, which has an 8(f) bargaining relationship with a labor organization, in certain circumstances, may obligate itself to a successor contract and, in order to determine under what circumstances an 8(f) employer has agreed to be bound by the results of bargaining in a multiemployer context, developed a two-part test—"First, we will examine whether the employer was part of the multiemployer unit prior to the dispute. . . . If this first inquiry is answered affirmatively, then we will examine whether that employer has, by a distinct affirmative action, committed to the union that it will be bound by the upcoming or current multiemployer negotiations." If an employer meets both parts of the test, it ". . . will be deemed to have clearly and unmistakably waived both its right to withdraw recognition on contract expiration and its right to bargain as an individual." Id. at 980.

Contrary to Respondent, counsel for the General Counsel argues that Frehner's withdrawal of its proxy to AGC was timely and that reliance upon *James Luterbach Construction Co.* is not necessary. In this regard, the General Counsel relies upon the Board's decision in *Plasterers Local 337 (Marina Concrete Co.)*, 312 NLRB 1103 (1993), in which, in the context of an 8(f) relationship, the employer became bound to an AGC collective-bargaining agreement with the Cement Masons Union and to successor agreements. During the term of the most recent of said agreements, the employer became a member of AGC. As herein, well prior to the expiration date of the agreement, AGC and the Cement Masons entered into "talks," which, in a memorandum, the parties characterized as off-the-record exploratory, nonbinding discussions and as not constituting collective bargaining, and, eventually, the discussions culminated in a tentative agreement on a new collective-bargaining agreement. Then, the parties agreed upon a date by which any employer, which did not desire to be bound by the agreement, was required to withdraw its bargaining authorization to AGC. Two days before the deadline date, the employer wrote to the AGC and to the Cement Masons, announcing its desire to not be party to the successor agreement between the parties and, thereafter, continued to apply the terms and conditions of employment of the existing contract. Subsequently, upon expiration of the existing agreement, attempts to commence negotiations between the employer and the Cement Masons failed, and the former wrote to the Cement Masons, stating its intent to no longer recognize and bargain with that labor organization. The Board initially noted that its decision in the matter would be in the context of the *Retail Associates* guidelines for withdrawal from multiemployer bargaining (id. at 1104 fn. 5), and then concluded that the employer's notice to AGC and the Cement Masons constituted timely and unequivocal notice as the prior informal discussions between AGC and the Cement Masons did not constitute negotiations within the meaning of the *Retail Associates* guidelines. In the latter regard, the Board specifically noted that, in their above-described memorandum, the parties stated their deliberate intent to remove their dealings from the constraints of *Retail Associates*. Id. at 1105 fn. 6. Accordingly, basing his arguments upon the Board's reasoning in *Marina Concrete*, counsel for the General Counsel contends that Respondent's *Retail Associates* defense herein is without merit as, notwithstanding that Frehner's July 27 letter to AGC, stating withdrawal of its proxy from AGC concerning bargaining on its behalf with Respondent, was submitted to AGC after discussions had commenced between the latter and Respondent, said discussions were characterized by the parties as "informal" in their June 1, 2004 memorandum of understanding and, in said document, Respondent and AGC "expressly" agreed that their memorandum of understanding did not constitute formal notice of an intent to terminate or open the existing collective-bargaining agreement and did not constitute a formal or binding agreement to open negotiations. Accordingly, contrary to counsel for Respondent, counsel for the General Counsel argues that Frehner's withdrawal of bargaining authority from AGC was timely, and, therefore, it was not bound to the result of bargaining between Respondent and AGC—the 2010 extension agreement. In these circumstances, counsel for the General Counsel urges that Respondent's failure and refusal to bargain with Frehner was, and remains, violative of Section 8(b)(3) of the Act.

I agree with counsel for the General Counsel that Respondent engaged in the alleged unfair labor practice herein; however, I reiterate my views, expressed during the trial, that counsel's reliance upon the *Mariana Concrete*, supra, rationale is erroneous and that this matter must be resolved pursuant to the rationale, expressed by the Board in *James Luterbach Construction Co.*, supra. Thus, in *Marina Concrete*, which involved an 8(f) bargaining relationship and a putative withdrawal from multiemployer bargaining, the Board resolved the matter in the context of the *Retail Associates* guidelines and, in that regard, the main focus of its decision was whether the employer's withdrawal of bargaining authority, which occurred subsequent to the conclusion of talks, but not bargaining, between the AGC and the Cement Masons, from the former was timely. However, in *James Luterbach Construction Co.*, the Board expressly stated that, because, in an 8(f) bargaining relationship, an employer is under no obligation to bargain for a successor collective-bargaining agreement, in a multiemployer context, as herein involved, the *Retail Associates* guidelines do not apply. Therefore, contrary to counsel for the General Counsel, whether or not the "informal discussions" between Respondent and AGC constituted collective bargaining and

whether or not Frehner's withdrawal of its proxy from AGC was timely are not relevant issues. Rather, herein, the only issues are (1) was Frehner a part of a multiemployer unit as of July 30, 2004, the effective date of the contract extension agreement between Respondent and AGC, and (2) whether Frehner, by "distinct affirmative action," recommitted to Respondent its intent to be bound to said extension agreement. Moreover, contrary to counsel for the General Counsel, the Board's decision in *Patterson-Stevens, Inc.*, 316 NLRB 1278 (1995), supports my view of the Board law. Thus, in that matter, in the context of a Section 8(f) bargaining relationship, the employer withdrew bargaining authority from a multiemployer bargaining association, of which it was a member, subsequent to a meeting of association members, during which they discussed the feasibility of early contract negotiations, and a meeting between representatives of the association and the union, which the administrative law judge described as "exploratory talks before the formal opening of negotiations." Id. at 1285. Then, deciding the case pursuant to the *Retail Associates* analytical framework, he concluded that the employer's withdrawal of bargaining authority was timely. In affirming the administrative law judge, the Board stated:

> We affirm the judge's conclusion that the Respondent timely and unequivocally withdrew from multiemployer bargaining before the Union and the [Association] commenced negotiations for a new contract. . . . Finally, we note that there are no exceptions to the judge's application of the rule of *Retail Associates* . . . to the circumstances of this case. Subsequent to the judge's decision, a Board majority held in *James Luterbach Construction Co.* . . . that the *Retail Associates* rule is inapplicable to multiemployer bargaining in the construction industry under 8(f). *The Board would have dismissed the Sec. 8(a)(5) allegation here under Luterbach.*

Id. at 1278 fn. 2 (emphasis added). Clearly, by noting the lack of exceptions, the Board indicated that its affirmance of the administrative law judge's legal rationale has no precedential value, and, rather than favorably commenting upon the judge's utilization of the *Marina Concrete* rationale, the Board pointedly commented that it would have analyzed the case under the *James Luterbach Construction Co.* guidelines.[25]

Accordingly, I reiterate my view that the validity of Respondent's defense, Frehner was, and remains, bound to the July 30 contract extension agreement between Respondent and AGC, must be analyzed utilizing the principles of *James Luterbach Construction Co.* In this regard, I initially note that, as, at least prior to July 2005, an 8(f) bargaining relationship existed between Respondent and Frehner, the latter was under no obligation to abide by a successor collective-bargaining agreement between AGC and Respondent and that the Board's focus is not on whether Frehner unequivocally and timely withdrew from multiemployer bargaining so as not to be bound to said agreement but, rather, upon whether, by July 30, 2004, the effective date of the contract extension agreement and the date upon which Respondent and AGC set forth their intent to formally open their existing agreement for the purpose of executing their extension agreement, Frehner demonstrated to Respondent its intent to be bound to the said agreement. As to this, Respondent argues that utilizing the two-part test in *James Luterbach Construction Co.* establishes that Frehner did, in fact, manifest such intent. I disagree. Concerning whether the Charging Party remained part of the multiemployer bargaining unit as of July 30, I agree with counsel for Frehner that this must be answered in the negative. Thus, while, arguably, Frehner remained part of the multiemployer bargaining unit, represented by AGC, through July 26, 2004,[26] I believe, by Pack's letter dated July 27, 2004, Frehner removed itself from the said multiemployer bargaining unit and effectively demonstrated its intent not to recommit to multiemployer bargaining. Counsel for Respondent points to the letter's language ("The withdrawing of our proxy is for future agreements only. . . .") as proof that Frehner intended to be part of the multiemployer bargaining unit, bound to the 2010 contract extension; however, the remainder of Pack's letter makes clear that he was referring to agreements beyond the existing 2000 through 2005 contract.[27] While this finding nominally ends the inquiry, assuming arguendo that counsel is correct and Frehner recommitted itself to the multiemployer bargaining unit for the 2010 contract extension, as of July 30, I do not believe Frehner ever engaged in any "distinct affirmative action" so as to recommit to Respondent its intent to be bound by the contract extension agreement. On this point, counsel for Respondent points to the attendance of Fred Courrier, a northern Nevada area manager for Respondent, at an AGC labor policy committee meeting, during which the possibility of engaging in informal discussions with Respondent was the topic of conversation, and to Pack's order to Courrier that he attend no further such meetings or participate in any informal discussions with Respondent. Contrary to counsel, whether or not Courrier attended an AGC labor policy meeting is relevant only if a representative of Respondent also attended or the attendance list and meeting minutes were shown to Re-

[25] Counsel for the General Counsel consumed 5 pages of his posthearing brief, contending that the Board's rationale in *Marina Concrete* remains relevant after *James Luterbach Construction Co.* While perhaps in a nonconstruction industry context, the former decision retains its relevancy, given the Board's silence in *Patterson-Stevens, Inc.,* as to the applicability of *Marina Concrete* and its specific statement that it would have dismissed under the *James Luterbach Construction Co.* rationale, *Marina Concrete* is no longer relevant in the construction industry context. In this regard, contrary to counsel, the Board accepted the judge's analysis but only in the absence of the filing of exceptions.

[26] While, by its wording, Frehner's1995 proxy agreement seemingly appoints AGC to represent it only for negotiating one labor agreement, the 1995 through 2000 contract with Respondent, Michael Pack, on behalf of Frehner, was active in bargaining for the 2000 through 2005 agreement, and Sean Stewart testified that Frehner itself believed the proxy continued to be valid for the 2000 through 2005 contract negotiations between Respondent and AGC and bound Frehner to said agreement.

[27] Counsel also argues that Frehner remained a member of AGC. However, there is no record evidence that mere membership in AGC binds each employer/member to every craft agreement, which is negotiated by that multiemployer association, and I do not believe that counsel would seriously make such a contention.

spondent; for the wording of the second part of the Board's test presupposes that the labor organization possesses knowledge of the employer's actions. Herein, there is no evidence that Respondent was aware that Courrier attended an AGC labor policy meeting or, indeed, that he voted for or against AGC engaging in informal discussions. Therefore, Courrier's attendance at an internal AGC meeting hardly constitutes a distinct affirmative act of recommitment. Finally, whatever knowledge Michael Pack may have possessed regarding the informal discussions between AGC and Respondent and notwithstanding how calculating his inaction might have been, the fact remains that Frehner did not participate in any of the informal discussions between AGC and Respondent, and the Board has held that ". . . mere inaction . . . is not sufficient to show that the 8(f) employer has reaffirmed its intention to be bound by the results of multiemployer bargaining." Id. at 980. In these circumstances, I find that Respondent's first defense for its refusal to bargain is without merit.

Turning to Respondent's second defense, that, by its actions, Frehner adopted the 2010 contract extension between Respondent and AGC, I initially note that there is no dispute that, from October 2004 through October 2005, Frehner did, in fact, make the increased dues checkoff payments (an increase from 43 cents to 44 cents per laborer employee per man hour of work) for its laborer employees to Respondent's trust funds. However, contrary to counsel for Respondent, I do not believe that this evidences adoption of the extension agreement by Frehner. At the outset, I agree with counsel for Frehner that what Frehner did may have been required by the existing 2000 through 2005 bargaining agreement. Thus, said agreement required an increase of 50-cents-per-hour in wages and fringe benefits payments on October 1, 2004, and, with a portion of said payment being allocated to wages, pursuant to the contractual formula for calculating the checkoff amount, such surely would have correspondingly increased the dues deduction for each employee to, at least, 44-cents-per-hour. Moreover, assuming Respondent is correct and Frehner deliberately based its increased dues checkoff on an amount equivalent to the contract extension agreement wage increase, while it is true that employers may be held to have adopted collective-bargaining agreements (*E.S.P. Concrete Pumping, Inc.*, 327 NLRB 711, 713 (1999), for the first 9 months of increased dues deductions, Frehner and Respondent had an 8(f) bargaining relationship, and the Board has held that, upon expiration of a collective-bargaining agreement, voluntary compliance with terms equivalent to those of a successor agreement ". . . gives rise to no obligations whatsoever."). Id. at 714 fn. 3; *Marina Concrete*, supra at 1106 fn. 11; *Garman Construction Co.*, 287 NLRB 88, 89 fn. 5 (1987). Further, in the 8(f) context, in order to find that an employer has adopted an agreement, the employer must manifest its intent to be bound. *E.S.P. Concrete Pumping*, supra at 713–714. At all times material herein, Frehner has continually argued that it was bound only to the 2000 through 2005 collective-bargaining agreement between Respondent and AGC and withdrew bargaining authority from AGC for any future agreement, and, rather than make additional dues deduction payments after October 2005, which were embodied in the 2010 contract extension agreement, Frehner refused to do so on grounds that no new collective-bargaining agreement existed between itself and Respondent. In these circumstances, I find Respondent's second defense to be without merit. Therefore, I find that Respondent violated, and continues to violate, Section 8(b)(3) of the Act by failing and refusing to meet and bargain in good faith with Frehner regarding a collective-bargaining agreement.

## CONCLUSIONS OF LAW

1. Frehner is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein, since July 18, 2005, by virtue of Section 9(a) of the Act, Respondent has been the exclusive representative for purposes of collective bargaining of all full-time and regular part-time laborers employed by Frehner in the State of Nevada, except Clark County, Lincoln County, the town of Tonopah, and the portions of Nye County and Esmeralda County lying south of Highway Six (U.S. 6); excluding all managers, salespersons, estimators, office clerical employees, all other employees, and supervisors as defined in the Act.
4. Since July 22, 2005, Respondent has refused to meet and bargain in good faith with Frehner, with regard to a collective-bargaining agreement covering the employees in the above-described bargaining unit, in violation of Section 8(b)(3) of the Act.
5. The above-described unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

I have found that Respondent engaged in, and continues to engage in, a serious unfair labor practice within the meaning of Section 8(b)(3) of the Act. Accordingly, I shall recommend to the Board that it be ordered to cease and desist from engaging in said acts and conduct and to engage in certain affirmative acts designed to effectuate the purposes and policies of the Act, including the posting of a notice detailing its obligations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

## ORDER

The Respondent, Laborers' International Union of North America, Local Union No. 169, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to meet and bargain in good faith for a collective-bargaining agreement with Frehner, covering the full-time and regular part-time laborers employed by the latter;

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Meet and bargain in good faith with Frehner for a collective-bargaining agreement, covering the latter's full-time or regular part-time laborers or until a valid impasse in bargaining is reached, and, if agreement is reached, embody the terms of said agreement in a written collective-bargaining agreement.

(b) Within 14 days after service by the Region, post at its office and hiring hall facility located in Reno, Nevada, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employee/members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Frehner, if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 16, 2006

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT fail and refuse to meet and bargain in good faith with Frehner Construction Co. for a new collective-bargaining agreement covering its full-time and regular part-time laborer employees.

WE WILL meet and bargain in good faith with Frehner Construction Co. for a collective-bargaining agreement covering its full-time and regular part-time laborer employees or until a valid impasse in bargaining is reached and, if an agreement is reached, embody said agreement in a written collective-bargaining agreement.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 169